FILE COPY

FILED
APR 29 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 788

UNITED STATES OF AMERICA,

Respondent,

against

RICHARD EICHENLAUB,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE G. SHIYA,
Counsel for Petitioner,
115 Broadway,
New York 6, New York.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

INDEX

PAGE

Opinions Below 2

Statement of Matter Involved 2

Disposition Below 7

Questions Presented 8

Reasons Relied on for Allowance of Writ 9

POINTS:

I—The allegations in the complaint are insufficient to establish illegal and fraudulent procurement of naturalization. 9

II—The Court has jurisdiction to determine the question of the validity and effect of petitioner's consent to denaturalization. 16

III—The propriety of dismissing a petition to set aside a consent judgment is to be determined with reference to the liberalizing amendment of Rule 60(b), notwithstanding it became effective after the decision of the District Court below. 20

Conclusion 26

Citations

PAGE

Cases:

Abo v. Clark, 77 F. Supp. 806 25
Baumgartner v. United States, 1944, 322 U. S. 665 ..... 7, 10, 15, 16
Bechtel v. United States, 176 F. 2d 741 14
Eichenlaub, U. S. ex rel. v. Watkins, 2 Cir., 167 F. 2d 659, 337 U. S. 955 3
Fix v. United States, 176 F. 2d 746 14
Klapprott v. United States, 335 U. S. 601, 336 U. S. 942 ..... 7, 16, 17, 20, 24
Knauer v. United States, 328 U. S. 654, at 659, 66 S. Ct. 1307, 90 L. Ed. 1504 15
Schneiderman v. United States, 320 U. S. 118, 159 ..... 10, 11, 13, 15, 16
Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 42 L. ed 539, 18 Sup Ct Rep 121 23
United States v. Borchers, C. C. A. 2, 1947, 163 F. 2d 347 17
United States v. Hauck, C. C. A. 2, 155 F. 2d 141, 147 ..... 10, 20
United States v. Heine, 151 F. 2d 813 (C. A. 2nd Cir) 2, 5
United States v. Olden, 84 F. Supp 522 ..... 7, 16, 24
United States v. Rossler, 2 Cir., 144 F. 2d 463 20
United States v. Sotzek, 2 Cir., 144 F. 2d 576 20
White v. Joyce (White v. Miller) 158 U. S. 128, 147.. 22
Pacific R. Co. v. Ketchum, 101 U. S. 289, 295 22

Statutes:

Nationality Act of 1940 2
8 U. S. C. 88 4
Act of May 10, 1920, Sec. 1, 8 U. S. C. A. 157 3
Act of 1940, Sec. 338, 8 U. S. C. A. 738 .....
F. R. Civ. P. Rule 60(b) 7, 16, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

against

RICHARD EICHENLAUB,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD EICHENLAUB, petitioner, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review an order which was entered on March 7, 1950, affirming an order of the Honorable John W. Clancy, United States District Judge for the Southern District of New York, entered on March 4, 1946, denying defendant's motion to vacate a judgment of denaturalization entered against him on January 25, 1944. 28 U. S. C. Sections 1254, 2101 provide for review in this Court.

Opinions Below

The opinion of the Court of Appeals appears at R. 24, and is reported in 180 F(2d) 314. The opinion of the District Court appears at R. 55.

Statement of Matter Involved

This case arose in the United States District Court for the Southern District of New York by a motion made under Rule 60(b), to vacate and set aside a judgment of the District Court in a suit to revoke petitioner's naturalization and cancel his certificate of naturalization pursuant to the provisions of Section 338 of the Nationality Act of 1940, 8 U. S. C. A. Section 738.

The petitioner, who was born in Germany in 1905, entered the United States in 1930. He was naturalized as an American citizen in 1936. He is married and his wife is a resident of the City and State of New York. For approximately twelve years after taking up residence in the United States, he was continuously employed and there is no indication that at any time during this period did he run afoul of Federal, State or Municipal authorities. Nor is there any indication of any word or deed by petitioner which can be construed as hostile to the United States prior to or at the time of his naturalization. He is a simple man of limited education and understanding.

In 1941, upon his plea of guilty in the United States District Court for the Eastern District of New York, he was convicted of conspiring to act as an agent for a foreign government without having been registered with the Secretary of State.[1] He was sentenced to imprisonment for eighteen months and fined $1,000.

---

[1] Several other defendants stood trial in this proceeding, and were convicted both on this and on a general espionage count. Their conviction was affirmed on this count, but reversed on the other. *United States* v. *Heine*, 151 F. 2d 813 (C. A. 2d Cir.).

The petitioner expected, when he pleaded guilty, that he would receive a suspended sentence and, if it is recalled that the plea was taken during an era of peace, when this country was not at war, there is no reason to suspect that the attorney who advised him was then unduly optimistic in encouraging this expectation. Although his plea was entered early in September, 1941, the sentence with respect to all of the accused—those who pleaded guilty and those who stood trial—was not imposed until after the termination of the trial. The events at Pearl Harbor occurred just prior to the conviction of the fourteen co-indictees who stood trial and whom the jury found guilty on December 12, 1941. Thereafter both those who pleaded guilty and those who were deemed guilty by the jury were sentenced on January 2, 1942.

Upon the expiration of his sentence, the petitioner's certificate of naturalization was cancelled in the United States District Court for the Southern District of New York by a decree entered January 25, 1944, wherein reference was made to a "consent and waiver" by petitioner to such cancellation. On April 19, 1944, a warrant for the arrest of the petitioner was issued and he has since that time been held in the custody of respondent. Thereafter, deportation proceedings were instituted against petitioner and, after a hearing before an Immigration Inspector and a review by the Board of Immigration Appeals, the Attorney General, in 1945, ordered his deportation.

He then obtained a writ of habeas corpus. After a hearing, the writ was dismissed and the dismissal was affirmed over his contention, among others, that Section 1 of the Act of May 10, 1920, 8 U. S. C. A. Section 157, permitted deportation only of aliens and not of citizens who had been denaturalized. *United States ex rel. Eichenlaub v. Watkins*, 2 Cir., 167 F. 2d 659. After granting certiorari, 337 U. S. 955, the Supreme Court affirmed. Four justices of the Court joined in the majority opinion which was

delivered by Mr. Justice Burton, and a dissenting opinion was entered by Mr. Justice Frankfurter, in which Mr. Justice Black and Mr. Justice Jackson joined. Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration of the decision.

Although petitioner was at large, engaged in defense work, and completely free from restraint after his discharge from prison on April 15, 1943, following the service of his sentence at Milan, Michigan, to April 19, 1944, a period of over twelve months, during which the war between the United States and Germany was at its height, it is significant that the petitioner was not considered so dangerous in the opinion of the United States Attorney for this District and his subordinates as to move them to detain petitioner as a person dangerous to the security of the nation. Following the denaturalization of petitioner and for a period of almost four months thereafter, the Attorney General of the United States failed to bring about his internment as a dangerous enemy alien, as was done in the case of numerous aliens placed in detention camps in various parts of the country, as a security measure.

The petitioner (the owner of a restaurant frequented by one or two customers later found to be trained undercover operators for the Reich) pleaded guilty to the first count only of the indictment, which charged a conspiracy under U. S. C., Title 18, Section 88, (R.2), and an overt act involving him in the alleged system and organization operated in the United States for the purposes of obtaining, collecting and receiving information of a military, naval, commercial or industrial nature, and data concerning the movement and description of cargo ships of American foreign registry. The said overt act consisted of a conference he had with an individual named Eberling on June 10, 1941, within a month of the time when he was indicted and several months prior to the commencement of the war between the United States and Germany.

The petitioner, who had no criminal record prior to the conviction on a plea of guilty to the above count, which was the lesser of the two counts in the indictment, had as the only alternative the matter of standing trial with thirty-two other defendants, some of whom were alleged to be in communication with the enemy by radio, on a sweeping conspiracy charge of espionage. Subsequent developments at that trial served to reveal how some of the defendants, notably the petitioner, were innocent sources of information used by trained and clever undercover agents operating in this country as mediums for procuring isolated data later assembled by ingenious methods to convey intelligence to foreign central intelligence headquarters.

The said conspiracy charge was well analyzed by the Circuit Court of Appeals for the Second Circuit in an opinion written on November 8, 1945, upon an appeal taken by one of the thirty-three defendants who stood trial and was convicted and sentenced after Mr. Eichenlaub's plea, at which time the Court discussed at considerable length the very underhanded and surreptitious devices to which that appellant, one Heine, resorted to deceive and conceal from those with whom he associated or from whom he obtained information his real intentions and purposes. See *United States* v. *Heine,* 151 F.(2d) 813.

While it is clear that the conviction of petitioner may not be attacked in this proceeding, it is nevertheless true that the attribution of "undesirablity", "deportability" "moral turpitude" or any felonious purposes to the petitioner on the basis of his plea to a statutory conspiracy charge on which he received the lightest sentence imposed on any of his co-defendants, smacks of the hysteria of those first Pearl Harbor days during which the jury, who tried most of those indicted with him, was moved to declare all of the defendants before them guilty of everything charged, and to disregard the sane judicial standards which the appellate courts have since laid down.

The denaturalization proceedings were filed against petitioner on August 17, 1943, charging that his naturalization was procured illegally and by fraud in that he was not, as he represented, a person attached to the principles of the Constitution and well disposed to the good order and happiness of the United States, that he did not truly intend to become a permanent citizen of the United States, and that his oath of allegiance then taken was false in that he did not absolutely and entirely renounce and abjure all allegiance to any foreign state or sovereign, but retained allegiance to Germany and did not intend to bear true faith and allegiance to the United States, or to support and defend the Constitution thereof. The petitoner interposed an answer denying the above charges, but was persuaded to sign the so-called consent and waiver referred to above, and on the basis thereof, the judgment of denaturalization was entered against him.

When he appeared at the office of the Assistant United States Attorney in charge of his case, he was presented with a document prepared by the latter which purported to give his consent to the denaturalization proceedings. He read it but could not understand its meaning. He was misinformed by the Assistant United States Attorney and by his own lawyer, who assured him that he could rely on the statement of the prosecutor to the effect that if he consented, his citizenship priviliges would be suspended only for the duration of the war. He insists that he was never informed or advised that in attaching his signature to the so-called consent, he was admitting perjury and fraud on the Court which had naturalized him as a United States citizen. He was not taken before the Court at any stage of the proceeding.

The motion to vacate this judgment on the ground that it was void, was made on January 28, 1946. This motion was denied by an order entered in the Office of the Clerk of the District Court on March 4, 1946, and timely appeal was taken therefrom.

Disposition Below

The Circuit Court affirmed by a divided bench on February 3, 1950. The grounds on which the Court based its decision were that (1) a consent to judgment in an action to revoke naturalization and cancel certificate of naturalization is sufficient as substitute for proof to support the judgment; (2) despite the decision of the Supreme Court in the *Baumgartner* case, the complaint was not insufficient even though the allegations therein related to conduct long subsequent to the filing of petitoner's petition for naturalization and admission to citizenship; (3) newly amended Rule 60(b) lacks authority to grant petitoner a hearing and set aside the judgment entered by the District Court against petitioner out of his presence, solely upon his written consent and without seeing petitoner or ascertaining that he was aware of the significance of the consent.

In the dissenting opinion, Judge Frank reached diametrically opposite conclusions and expressed his belief that the judgment of the District Court should be reversed because (a) the allegations in the complaint would not have sustained the judgment even though they had been established by evidence beyond possible doubt, in the light of *Baumgartner* v. *United States,* 322 U. S. 665; and (b) that under Rule 60(b) the petitioner is not barred by limitations of time from making the motion to vacate the judgment. Judge Frank cited *Klapprott* v. *United States,* 335 U. S. 601, 336 U. S. 942, and *United States* v. *Olden,* 84 F. Supp. 522, as authority for the proposition that if because of his inadequate understanding of the language, the petitioner did not comprehend what his lawyer was telling him, the consent may well not be binding upon him and petitioner is entitled to a hearing wherein on proving this and other related facts, the judgment should be vacated.

Questions Presented

1. Whether a judgment of denaturalization may be entered on a "consent and waiver" without a hearing where it is charged that petitioner's naturalization was fraudulently and illegally procured, while the allegations of the complaint refer principally to acts performed and statements made long subsequent to his naturalization.

2. Whether in the circumstances of this case, the District Court properly denied petitoner's motion to vacate a judgment of denaturalization entered out of petitioner's presence, solely upon his written consent and without seeing petitioner or ascertaining that he was aware of the significance of the so-called consent.

3. Whether a consent to a judgment of denaturalization may not be binding upon petitioner on a showing that because of his inadequate understanding of the language, he did not comprehend what the prosecutor and his lawyer were telling him as to its import and legal effects.

4. Whether, if understanding is impossible, petitioner should not suffer the legal consequences of a valid consent to a valid proceeding.

5. Whether the Court of Appeals properly affirmed the order denying petitioner's motion to vacate the judgment.

Reasons Relied on For Allowance of Writ

POINT I

The allegations in the complaint are insufficient to establish illegal and fraudulent procurement of naturalization.

It appears from the record, pages 8 to 12, that the complaint charged the defendant with fraudulently and illegally procuring his naturalization on May 20, 1936, "(a) in that at the time of the filing of his petition for naturalization and at the time he was admitted to citizenship, he was not attached to the principles of the constitution * * * (b) * * * he did not intend to renounce or abjure all allegiance and fidelity to the German Reich; (c) he took the said oath of allegiance with a mental reservation which nullified the oath; (d) * * * he did not intend to support and defend the Constitution * * * (e) he did not intend to bear true faith and allegiance to the United States and the Constitution and laws thereof; (f) since being admitted to citizenship he has not supported and defended the Constitution * * * and has not borne true faith and allegiance to the United States and the Constitution and laws thereof."

The complaint specified, in support of these allegations, that "(a) In or about 1937 (i.e., *after his admission to citizenship*) he acted as an agent in the United States of the German Customs and Investigation Division of Hamburg and Bremen, Germany; (b) From and after the date of his naturalization he collaborated and consorted with agents of a foreign government, to wit, Germany, * * * (c) On September 4, 1941, he pleaded guilty in the United States District Court for the Eastern District of New York, to a conspiracy to act as an unregistered agent of a foreign principal, to wit, Germany * * *."

Since the government is limited in its proof to the matters charged in the complaint,

> *Schneiderman* v. *United States,* 1943, 320 U. S. 118, 159;
> *United States* v. *Hauck,* C. C. A. 2, 1946, 155 F. 2d 141, 147,

and those allegations, in the main, relate to conduct subsequent to the event, the complaint is insufficient to establish illegal and fraudulent procurement of naturalization,

> *Baumgartner* v. *Untied States,* 1944, 322 U. S. 665.

This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead, the Government seeks to turn the clock back eight years after full citizenship was conferred upon the petitioner by judicial decree and to deprive him of the priceless benefits that derived from that status. In its consequences, it is more serious than the taking of one's property, or the imposition of a fine or other penalty, for it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. *Schneiderman* v. *United States, supra.*

In the case last cited, the Court stated that "in an action instituted for the purpose of depriving one of the precious right of citizenship previously conferred, we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted * * *." The Court went on to say that the burden of proof was on the Government in that case and that burden must be met with evidence of a clear and convincing character that when citizenship was conferred upon petitioner in 1927, it was not done in accordance with strict legal requirements.

After analyzing the evidence presented by the Government in support of the charge that Schneiderman's naturalization was illegally procured in that by reason of his membership in the Communist Party, and his adherence to its program, he had not been attached to the principles of the Constitution during the relevant period immediately preceding his naturalization, the Court held that the Government had failed to establish its case by clear and convincing evidence and used this language: "So uncertain a chain of proof does not add up to the requisite 'clear, unequivocal and convincing' evidence for setting aside a naturalization decree. Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of the majority thought and the stresses of the times. Those are consequences foreign to the best traditions of this nation, and the characteristics of our institutions."

As has been stated above, in reviewing the facts in this case, there is no indication that the petitioner at any time prior to, or at the time of taking the oath of allegiance to the United States, had been guilty of any act of disloyalty or hostility to the United States of America. Nor is there any evidence or intimation referred to in the Government's complaint that the petitioner had at any time prior to his admission to citizenship, run afoul of any Federal, State of Municipal authority. The only basis upon which, the consent aside, the denaturalization could be justified is his plea of guilty in September 1941, while this country was at peace, to a conspiracy to act as an unregistered agent of Germany, about six years after his admission to citizenship.

Former Chief Justice Stone in his dissent in *Schneiderman* v. *United States, supra,* at page 171, said: "Decision whether he was lawfully entitled to the citizenship which he procured, and consequently whether he is entitled to

retain it, must turn on the existence of his attachment to the principles of the Constitution *when he applied for citizenship,* and that must be inferred by the trier of fact, from his conduct during the *five year period* * * * (page 172). Our concern is only that the declared will of Congress shall prevail—that no man shall become a citizen and shall retain his citizenship whose behavior five years *before his application* does not show attachment to the principles of the Constitution." *These words, with emphasis added, are from an opinion in which Chief Justice Stone dissented from the Supreme Court's reversal of a judgment denaturalizing an admitted communist.*

The Baumgartner case involved the question of whether naturalization was fraudulently and illegally procured in that the oath of allegiance was falsely taken. The evidence consisted principally of acts performed and statements made by the naturalized person *subsequent to his naturalization* which showed a preference for Nazi Germany. The court ruled against the Government on the ground that there was no "clear and convincing evidence" *that at the time of his naturalization the naturalized person reserved his allegiance to Germany.*

The Court further there held that *utterances made or acts committed in years subsequent to the oath are not readily to be charged against the state of mind existing when the oath was administered.* 322 U. S. p. 675. "Troubled times and the emotions of the hour may elicit expressions of sympathy for old acquaintances and relatives across the waters. Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth. And during a period when new strength of the land of one's nativity was flamboyantly exploited before its full sinister meaning had been adequately revealed even to some Americans of

the oldest lineage, such old cultural loyalty, it is well known, was stimulated into confusion of mind and sometimes to expressions of offensive "exuberance".

The Court dismissed as insignificant the statement at the trial that Baumgartner's attitude toward the principles of the American Government was the same in 1932 as it was at the time of the trial. It then went on to say "And so we conclude that the evidence as to Baumgartner's attitude after 1932 affords insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimer Republic and embracing allegiance to this country so as to warrant the infliction of the grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship".

The gravamen of the Government's complaint and of the opinions below, is that petitioner consciously withheld allegiance to the United States and its Constitution and laws; in short, that petitioner was guilty of fraud. To prove such intentional misrepresentation, it could only offer the proof specified therein, namely, that after the date of his naturalization, petitioner committed certain acts which established his allegiance to the country of his origin. Nothing else could possibly be offered to show that petitioner was aware of a conflict between his views and the new political allegiance he assumed.

The Court below hinted in its opinion that an amendment might have been made to the complaint introducing new issues which the Government could have presented at a trial had there been one. The answer to this contention may be found in the language of the Supreme Court in the *Schneiderman* case, *supra,* where it was said:

> "This disposes of the issues framed by the Government's complaint which are here pressed. As additional reasons for its conclusion that the peti-

> tioner's naturalization was fraudulently and illegally procured the district court found, however, that petitioner was a disbeliever in, and a member of an organization teaching disbelief in organized government, and that his oath of allegiance, required by 8 USCA 1927, ed Sec. 381, was false. These issues are outside the scope of the complaint, as is another ground urged in support of the judgment below as to which the district court made no findings. *Because they are outside the scope of the complaint, we do not consider them.* As we said in *DeJonge* v. *Oregon*, *'Conviction upon a charge not made would be sheer denial of due process.'* 299 US 353, 362, 81 L. ed. 278, 282, 57 S. ct. 255. A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves important adjudication of status. *Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint.''*

The cases of *Bechtel* v. *United States,* 176 F. 2d 741, and *Fix* v. *United States,* 176 F. 2d 746, decided by the United States Court of Appeals for the Ninth Circuit as recently as August 5, 1949, involved denaturalization proceedings brought by the United States against the defendants named, on the ground that the said defendants consciously withheld allegiance to the United States and its Constitution and laws when they were naturalized, and retained allegiance to Germany.

In the second of the cases cited, the Court stated:

> ''The only way in which it may be said that there was any evidence whatever of Fix's mental attitude on January 6, 1936, when he took the oath, is by projecting backward the evidence of his later disloyal attitude, and making the inference that his

> earlier mental feeling was the same. In the Bechtel case we have noted that the dangers of reliance upon such evidence were stated in *Baumgartner* v. *United States*, 322 U. S. 665, at page 675, 64 S. Ct. 1240, 88 L. Ed. 1525. The language of *Knauer* v. *United States*, 328 U. S. 654, at 659, 66 S. Ct. 1307, 90 L. Ed. 1504, seems particularly applicable here: 'Human ties are not easily broken. Old social or cultural loyalties may still exist, though basic allegiance is transferred here. * * * And even political utterances, which might be some evidence of a false oath if they clustered around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization'."

In both cases the Court reversed the judgments of the District Court on the ground that the evidence did not justify cancelling the certificates of naturalization.

In particular, the complaint in the instant case charged that in and following the year after the petitioner's naturalization, he acted as a German agent and collaborated with German agents. In the light of *Baumgartner* v. *United States, those charges had they been established by evidence beyond possible doubt, would not have sustained the judgment. The Schneiderman* case held that in determining whether a naturalization certificate should be revoked, the Court may not go into the *issues outside of the scope of the complaint.*

The burden upon the Government in a proceeding to cancel a naturalization certificate on the ground that the applicant represented himself to be "attached to the principles of the Constitution of the United States," when such was not the case, to establish the fact by clear, unequivocal and convincing evidence, is not met by proof that *he com-*

mitted the offenses referred to in the complaint years after his admission to citizenship.

It is a serious question, in the light of the decisions of the *Schneiderman, Baumgartner* and *Klapprott* cases, whether the Congress ever intended that the safeguards thrown around the citizen by law might be waived even by a valid consent involving no irregularities. On the authorities cited, it is obvious that the consent herein is insufficient in law to support the entry of a judgment of denaturalization.

It is therefore respectfully submitted that the judgment to denaturalize petitioner is void and should be reversed.

POINT II

The Court has jurisdiction to determine the question of the validity and effect of petitioner's consent to denaturalization.

In the case of *United States* v. *Olden*, 1949, 84 Fed. Supp. 522, Judge Rifkind held under circumstances very similar to those prevailing in the case at bar, that he had jurisdiction, under newly amended Rule 60(b), F. R. Civ. P., to hear and determine the question of the validity and effect of defendant's consent to denaturalization.

> Cf. *Klapprott* v. *United States*, 1949, 335 U. S. 601, 336 U. S. 942.

He thereafter held a hearing and took evidence to determine the factual question whether defendant's consent to denaturalization was truly voluntary and consciously intended by him to effect the surrender of his citizenship.

Said the Court in that case:

> "Had the hearing revealed such conscious intent, it might have become necessary to consider the effect, if any, of the most recent Supreme Court decisions, upon the propositions that a voluntary and conscious consent to denaturalization bars the consenter from any relief,
>
> *United States* v. *Borchers*, C. C. A. 2, 1947, 163 F. 2d 347,
>
> and that a consent judgment rendered without inquest or hearing may be invalid.
>
> Cf. *Klapprott* v. *United States, supra,* concurring opinion by Rutledge, J., 616.
>
> But the hearing on the motion established that defendant's consent, though given without duress or coercion, was not an intentional surrender of citizenship made by one possessed of understanding of the proceedings or awareness of his rights and of the consequences of his act."

It is submitted that the facts in the instant case reveal that the petitioner's consent herein, like Olden's, was not an intentional surrender of citizenship made by one possessed of the understanding of the proceedings or awareness of his rights and of the consequences of his act.

Petitioner was born in Germany, entered the United States in 1930 and was naturalized in 1936. He had little education abroad and none whatsoever here. By occupation he was a bartender. He was served with the summons and complaint on or about August 17, 1943, and he turned over these documents to the attorney who helped him procure a license to operate his tavern. On the instructions of petitioner, the said attorney prepared and filed an answer denying the allegations of the complaint. The Gov-

ernment failed to proceed with the trial of the case and nothing further was done in the matter until the 24th day of January, 1944, when petitioner was ordered to appear before Louis J. Bender, Assistant United States Attorney for the Southern District of New York. He was given no notice as to the purpose of his appearance. After a lengthy conference with Mr. Bender, he was persuaded to sign a document which purported to give his consent to the denaturalization proceedings.

He was told that if he contested the case, the Government would regard him and his wife as recalcitrants and make a *permanent* court record of his denaturalization, whereas, if he consented, the effect would merely be a *suspension* of citizenship privileges for the duration of the war. The lawyer who had previously taken care of his bar and grill license requirements, accompanied him and advised him that he could rely on the statement made by the Assistant United States Attorney. The war was then at its height and the lawyer pointed out to petitioner that due to the stresses of the times and the emotions of the hour, his chances of receiving a fair trial at the hands of a jury were nil. Accordingly, he urged him to accede to the prosecutor's suggestion and request.

No claim has been made that petitioner was ever informed or advised of his constitutional rights or any possible interrelationship of what he was signing with his right of domicile or deportability. He was not taken before the Court either before or after he signed the so-called consent and waiver prepared by the Assistant United States Attorney, so that the Court might make sure that he understood the significance of the proceedings.

Again, too strong emphasis cannot be placed upon the fact that the education of the petitioner is meager. His understanding of the English language itself is limited. He insistently contends that he did not understand the consent

or the fact that in attaching his signature to it, he was admitting perjury and fraud on the Court which had naturalized him. Nor did he realize that as a penalty for this admission, he was forfeiting and giving up his citizenship permanently, thereby becoming an enemy alien who might be, as in fact he was, incarcerated for the next five or six years, and then held subject to deportation. Furthermore, judgment was rendered the day following the signing of the consent and as above stated, the Court did not once see the petitioner at any stage of the proceeding, not even at the time of its termination by the entry of a denaturalization decree.

Accordingly, it is submitted that the office of the United States attorney for the southern District of New York misinformed petitioner as to the effect of the so-called consent which that office offered petitioner to sign, and the result thereof was equivalent to the commission by the prosecutor of a fraud upon petitioner in deliberately taking advantage of his ignorance and misunderstanding of the results attendant upon the execution of the consent. The petitioner was justified in relying upon what his attorney told him when he permitted him to affix his signature to a document whose legal significance was wholly different from what petitioner mistakenly understood it to be.

Because of the misinformation conveyed by the office of the United States Attorney to petitioner, it is respectfully urged that his consent, which is the sole justification for the issuance of a denaturalization judgment, was improperly obtained and is therefore void, and of no effect whatsoever.

POINT III

The propriety of dismissing a petition to set aside a consent judgment is to be determined with reference to the liberalizing amendment of Rule 60(b), notwithstanding it became effective after the decision of the District Court below.

A court of equity should be quick to acknowledge the right of the petitioner to withdraw his consent when the full import thereof became known to him, or at least to give him an opportunity to attack it because of the nature in which it was obtained and to defend the action upon its merits. It is submitted that on its face the consent is insufficient in law in the light of the decisions of this Court cited above. See also *United States* v. *Sotzek,* 2 Cir., 144 F. 2d 576; *United States* v. *Rossler,* 2 Cir., 144 F. 2d 463; *United States* v. *Hauck,* C. C. A. 2, 1946, 155 F. 2d 141.

Amended Rule 60(b) of the Federal Rules of Civil Procedure, became effective March 19, 1948. That was after the District Court denied the motion to set aside this judgment, but before affirmance of the District Court action by the Court of Appeals. For this reason the Government in its brief below contends that amended Rule 60(b) should not be applied here. But Rule 86(b) made amended 60(b) applicable to "further proceedings in actions then pending" unless it "would work injustice" so to apply the rule. On the authority of *Klapprott* v. *United States, supra,* it is submitted that amended Rule 60(b) should be applied here.

Amended Rule 60(b) authorizes a court to set aside "a void judgment" without regard to the limitation of a year applicable to motions to set aside on some other grounds. It is urged that this judgment is also void because rendered by a District Court without hearing any evidence. There is support for this proposition in the language of

the prevailing opinion in the *Klapprott* case by Mr. Justice Black, who stated:

> "For the following reasons it seems peculiarly appropriate that a person's citizenship should be revoked only after evidence has established that the person has been guilty of prohibited conduct justifying revocation.
>
> "Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. Persons charged with crime in United States courts cannot be convicted on default judgments unsupported by proof. Even decrees of divorce or default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by actual proof. The reasons for requirement of proof in cases involving money apply with much greater force to cases which involve forfeiture of citizenship and subsequent deportation. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U. S. C. Sec. 719. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty. * * * It may result also in loss of both property and life; or of all that makes life worth living.' *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment."

But contrary to the persuasive reasoning of this Court, the prevailing opinion of the Circuit Court took the view that:

> "It is true that clear and convincing evidence is necessary to support a contested complaint which seeks to cancel a certificate of naturalization. *Baumgartner* v. *United States,* 322 U. S. 655; *Schneiderman* v. *United States,* 320 U. S. 118; *United States* v. *Sotzek,* 2 Cir., 144 F. 2d 576. But it would seem clear that, regardless of the standard of proof required, equivalent to proof is a consent to the entry of judgment given by a defendant with the knowledge and consent of an attorney representing him in what, for the purposes of this appeal, just be taken to have been a competent and loyal manner. Even assuming that proceedings for denaturalization under Section 338 of the Nationality Act are wholly to be governed by the same principles as criminal cases, the same result must follow, for a plea of guilty or a plea of nolo contendere to a criminal charge makes unnecessary the introduction of evidence by the prosecution, and a consent judgment in denaturalization proceedings must be considered the equivalent of such pleas, or one of them."

The answer to this contention, however, is to be found in Judge Frank's analysis of the facts in his dissent in the instant case, which seems impregnable (R. 30):

> "He (petitioner) had such a limited knowledge of the English language that he did not understand the meaning of the written consent he gave to the denaturalization judgment. It may well be that, if those facts should be proved, the judgment should be vacted. See *United States* v. *Olden,* 84 Fed. Supp. 522. To be sure, in the *Olden* case, defendant had given his consent without the advice of a lawyer,

whereas appellant here had such advice. However, if, because of his inadequate understanding of the language, he did not comprehend what his lawyer was telling him, the consent may well not be binding upon him, especially as the court seems to have entered the judgment, out of appellant's presence, solely upon his written consent and without seeing appellant or ascertaining that he was aware of the significance of the consent. See L. Hand, J., in *Ricketts* v. *Pennsylvania R. Co.*, 153 F (2d) 757, 760 (C. A. 2); *Williston, Contracts,* Sec. 95A and cases cited; *Thoroughgood's Case,* 2 Coke 9a; *Swift & Co.* v. *United States,* 276 U. S. 311, 324. Those authorities would seem to have peculiar force in denaturalization proceedings; see *Klapprott* v. *United States,* 335 U. S. 601, 336 U. S. 942. The problem is, I think, not unlike that arising when, in a criminal action, the defendant, not exercising an intelligent, informed judgment, pleads guilty or waives trial by jury. Cf. *Adams* v. *United States ex rel. McCann,* 317 U. S. 275; *Waley* v. *Johnston,* 316 U. S. 101, 103-104; *United States* v. *Denniston,* 89 F. (2d) 696, 698 (C. A. 2); *Accardi* v. *United States,* 15 F. (2d) 619, 621 (C. A. 8)."

In the *Swift* case, *supra,* the Supreme Court held that decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, *Pacific R. Co.* v. *Ketchum,* 101 U. S. 289, 295, 25 L. ed. 932, 935; *White* v. *Joyce* (*White* v. *Miller*) 158 U. S. 128, 147, 39 L. ed. 921, 928, 15 Sup. Ct. Rep. 788; or of fraud in its procurement, *Thompson* v. *Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121.

But even if this judgment of denaturalization is not treated as void on the various grounds heretofore urged,

there remain other compelling reasons under amended 60(b) for relieving the petitioner of its effect. What was said of the defendant Olden in *United States* v. *Olden, supra,* applies with equal force here. Said Judge Rifkind in that case:

> "In any case, I do not believe that the defendant understood the consent, or realized, when he signed it, that he was giving up his citizenship, thereby becoming an enemy alien who might be (as, in fact, he was,) incarcerated for the next six or seven years, and then subject to removal.
>
> That the defendant took no appeal is no bar to present relief. He was quite unaware of his rights and could hardly have been expected to appeal from a consent judgment the nature of which he did not really comprehend. Furthermore, judgment was rendered the same day the consent was signed, and the defendant was immediately confined in a detention camp. He was not released until a few months ago."

In the instant case, petitioner did not understand the consent or realize its consequences, which resulted in his incarceration for the last six years, and his being presently held for deportation. His motion is not barred under the provisions of amended Rule 60(b), and the fact that he took no appeal is no bar to present relief. Under the circumstances mentioned, petitioner's prayer for setting aside the judgment based on his so-called consent, should not be considered only under the excusable neglect, but also under the "other reason" clause of 60(b), to which the one year limitation provision does not apply. This clause vests power in Courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. *Klapprott* v. *United States, supra.*

What was said of Klapprott in the case last cited, has equal application to petitioner herein. Mr. Justice Black speaking for the Court, there stated:

> "Furthermore, the complaint in the denaturalization proceeding strongly indicates that the Government here is proceeding on inadequate facts, just as it did in the criminal cases it brought against petitioner. For if the Government had been able on a trial to prove no more than the particular facts it alleged in its denaturalization complaint, it is doubtful if its proof could have been held sufficient to revoke petitioner's citizenship under our holdings in *Baumgartner* v. *United States,* 322 U. S. 655; *Schneiderman* v. *United States,* 320 U. S. 118, *Knauer* v. *United States,* 328 U. S. 654, and see Rule 9(b) of the Rules of Civil Procedure. And all petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. Petitioner is entitled to a fair trial. He has not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing."

Where under the stress and necessities of war conditions, errors of officials and mistakes of individuals result in hardships on persons long domiciled here, the Government should be slow to afflict and quick to make retribution, neither reluctant nor evasive in correcting wrongs inflicted upon citizens, since a forthright recognition of injustice is the surest means of maintaining faith and confidence in our system of law. *Abo* v. *Clark,* 77 F. Supp. 806.

Conclusion

In the instant case, since the Government is limited in its proof to the matters charged in the complaint, and those allegations because, in the main, they relate to conduct subsequent to the event, may be insufficient to establish illegal and fraudulent procurement of naturalization, the judgment of the Court below should be reversed, but, if the judgment be not reversed, it is submitted that the Court has jurisdiction under Rule 60(b) F. R. Civ. P. to remand the cause to the District Court to hear and determine the questions of the validity and effect of petitioner's consent to denaturalization.

It is respectfully submitted that this petiton for certiorari should be granted.

GEORGE G. SHIYA,
Counsel for Petitioner.